In The
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1467

UNITED STATES GYPSUM COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY,

Petitioners,

-vs-

JACKSONVILLE BUSINESS SERVICES, INC., LIBERTY MUTUAL INSURANCE COMPANY, JOHN ANDERSON, and INDUSTRIAL RELATIONS COMMISSION, STATE OF FLORIDA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

LUKE G. GALANT
320 East Adams Street
Jacksonville, Florida 32202
Attorney for Petitioners

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Cases Cited

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No.

UNITED STATES GYPSUM COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY,

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JACKSONVILLE BUSINESS SERVICES, INC., LIBERTY MUTUAL INSURANCE COMPANY, JOHN ANDERSON, and INDUSTRIAL RELATIONS COMMISSION, STATE OF FLORIDA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioners, United States Gypsum Company and American Motorists Insurance Company, by their undersigned attorney, pray that a Writ of Certiorari issue to review Order of the Supreme Court of the State of Florida, entered on the 21st

day of January, 1976[1], denying Petition for Writ of Certiorari[2] to review Order[3] entered by the Industrial Relations Commission of the State of Florida on May 6, 1975, which reversed *sua sponte* the Order[4] of the Judge of Industrial Claims of the State of Florida issued on the 31st day of March, 1975, denying respondent Liberty Mutual Insurance Company's claim for reimbursement and/or indemnification.

JURISDICTION

The Supreme Court of the State of Florida by its Order dated January 21, 1976, allowed to stand the Order of the Industrial Relations Commission dated May 6, 1975, which Order of the Supreme Court of Florida is a violation of the Petitioners' right to due process and equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a State appellate tribunal may, ***sua sponte***, without violating due process, reverse the comprehensive decision of a trial judge solely because mechanical failure of a recording machine prevented transcription of the evidence adduced at trial.

2. Whether the appellate tribunals of Florida may without violating the right to equal protection of parties to Workmen's

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1. App. A
2. App. B
3. App. C
4. App. D

Compensation actions, set aside trial judges' decisions in Workmen's Compensation cases solely because no record of such hearings is available for appeal, while refusing to set aside decisions in common law actions despite the same unavailability of transcript.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Fifth Amendment of the Constitution of the United States.[5]

2. Fourteenth Amendment of the Constitution of the United States.[6]

CONCISE STATEMENT OF THE CASE

Respondent John Anderson is only a nominal party to this cause, as is Jacksonville Business for that matter, the real issue being simply which of two carriers had the coverage, whether respondent Liberty Mutual Insurance Company as workmen's compensation carrier for Jacksonville Business Services, Inc., or American Motorists Insurance Company as workmen's compensation carrier for U. S. Gypsum Company.

Claim was made for reimbursement and/or indemnification by respondent Liberty Mutual Insurance Company and it asserted that when the respondent John Anderson was injured on July 13, 1972, he was an employe of United Statas Gypsum Company.

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5. App. E
6. App. F

A detailed and extensive hearing was held before the Judge of Industrial Claims. Following this hearing at which five witnesses testified, the Judge of Industrial Claims entered an eleven-page Order dated March 31, 1975. That Order, extensively detailing the Judge's findings of fact and conclusions of law, denied Liberty Mutual Insurance Company's claim.

In the process of preparing the record for respondent Liberty Mutual Insurance Company's Application for Review, it was discovered that the Voicewriter used by the Judge of Industrial Claims to record the testimony at the hearing had malfunctioned and thus failed to record any testimony. The Judge of Industrial Claims certified to the Industrial Relations Commission that this malfunction had occurred and requested an extension of time for the filing of an appeal. The Industrial Relations Commission responded by issuing an Order, *sua sponte*, dated May 6, 1975, and it remanded the cause to the Judge of Industrial Claims for hearing de novo. On June 4, 1975 the petitioners herein filed a Petition for Writ of Certiorari in the Supreme Court of Florida, seeking reversal of the Industrial Relations Commission's Order of May 6, 1975. The Petition and the brief in support thereof rested *inter alia* upon the violation of the petitioners' rights to federal constitutional due process and equal protection. That Petition was denied by Order of the Supreme Court of Florida on January 21, 1976, which Order found "no departure from the essential requirements of law." This Petition is filed for the purpose of seeking reversal of that Florida Supreme Court Order.

ARGUMENT

1. WHETHER A STATE APPELLATE TRIBUNAL, *SUA SPONTE*, MAY WITHOUT VIOLATING DUE PROCESS,

REVERSE THE COMPREHENSIVE DECISION OF A TRIAL JUDGE SOLELY BECAUSE MECHANICAL FAILURE OF A RECORDING MACHINE PREVENTED TRANSCRIPTION OF THE EVIDENCE ADDUCED AT TRIAL?

A presumptively fair and impartial trial was held at which the Respondent employee herein was given a full and complete hearing. Following trial a comprehensive judicial opinion was rendered detailing at length the factual premises upon which the judge arrived at his decision holding Petitioners herein free from liability. That was the last time consideration has been given to the *merits* of this case.

The question for determination here is whether the trial judge's decision may be reversed by a State appellate court simply because no formal, contemporaneous record was kept of the trial. The Petitioners contend it may not, without offending fundamental justice.

An essential doctrine of our vaunted system of ordered justice and due process of law is the doctrine of *res judicata*. That doctrine demands that when a party's legal rights are adjudicated in a complete, valid and conclusive trial, that party may not be subjected to a retrial of the same issues, *Commissioner v. Sunnen*, 333 U.S. 591. The Florida appellate courts in this case have done violence to that doctrine and to due process by requiring Petitioners to undergo a trial *de novo* on issues already conclusively decided. It is the Petitioners' contention that a trial judge's decision may not be reversed except upon a showing of error. Here, since no error has been shown on the part of any party, vacating the trial judge's decision was a violation of Petitioner's constitutionally guaranteed right to the benefits of the decision in their favor.

This question has not been previously considered by this

court. It would substantially contribute to the orderliness of the judicial process to determine whether the right to the benefits of an errorless judgment is as fundamental and necessary as the right of an appeal.

2. WHETHER THE APPELLATE TRIBUNALS OF FLORIDA MAY WITHOUT VIOLATING THE RIGHT TO EQUAL PROTECTION OF PARTIES TO WORKMEN'S COMPENSATION ACTIONS, SET ASIDE TRIAL JUDGES' DECISIONS IN WORKMEN'S COMPENSATION CASES SOLELY BECAUSE NO RECORD OF SUCH HEARINGS IS AVAILABLE FOR APPEAL, WHILE REFUSING TO SET ASIDE DECISIONS IN COMMON LAW ACTIONS DESPITE THE SAME UNAVAILABILITY OF TRANSCRIPT?

In denying the Petitioners' Petition for Writ of Certiorari, the Florida Supreme Court violated the Petitioners' right to Equal Protection of the laws.

Petitioners stood before the Supreme Court of Florida as defendants in a Workmen's Compensation claim. That Court held in effect that when defendants in Workmen's Compensation claims win, but for some reason outside said defendants' control no record of the trial is available for appeal, defendants' prevailing must be vacated and a retrial ensue.

In contrast to this is the treatment of defendants in common law and equity actions in Florida. In those actions it is held that "[T]he obligation to furnish a record sufficient to support the appeal is upon the party urging error." *Moyer v. Moyer*, (1959, 3DCA), 114 So. 2d 638. See also *Lyden v. Dipiera*, (1962, 3DCA), 147 So. 2d 573 and *Smith v. Smith*, (1963, 1DCA), 148 So. 2d 287. In *Agricultural Delivery Service v. Travelers Insurance Company*, (1972, 2DCA), 269 So. 2d

429, the court noted that the lower court had misconstrued a prior mandate to attempt to produce a record for appeal. "It did not direct, nor did it permit, the granting of a new trial *per se*. Indeed, the *parties had their day at trial* . . ." [Emphasis added].

Thus we see that the appellate courts of Florida apply one rule against appellees in Workmen's Compensation cases but a different rule for appellees in other types of civil actions. This arbitrary distinction is based upon no discernible or reasonable classification but rather represents an invidious and needless discrimination against a certain class of litigants in violation of the right to equal protection of the laws.

For a defendant in a litigated matter to win its case but be forced to try it again, de novo, simply because the device recording the testimony failed is but enough, but for the appellate courts of a State, in this instance Florida, to maintain two different standards—one in civil cases and another in workmen's compensation cases—is even worse. Respondent Liberty Mutual would assert that the dual standards are proper because a workmen's compensation hearing is an administrative procedure and benefits from a statutory provision that such hearings shall be reported.

However, the Supreme Court of Florida has several times held to the effect that in workmen's compensation cases a Judge of Industrial Claims is on a par with a Circuit Judge and that the Industrial Relations Commission is at the level of a District Court of Appeal. Therefore, there should not be two different rules for the situation present in the instant case.

In *Pierce v. Piper Aircraft Corporation*, 279 So.(2d) 281

(1973), the Supreme Court of Florida in a unanimous decision stated:

> "In 1971, the Industrial Relations Commission began a new era when the Governor reorganized it into the fashion of a court. Legislative sanction was given to this reorganization by Section 20.17(7), Florida Statutes, F.S.A., which creates an Industrial Relations Commission, providing, in pertinent part,
>
> '(7) There is created within the department of commerce an industrial relations commission to consist of a chairman and two other members all to be appointed by the governor, with the advice and the consent of the senate, and all to serve full time. Not more than one appointee shall be a person who, on account of his previous vocation, employment, or affiliation, shall be classified as a representative of employers; and not more than one such appointee shall be a person who, on account of his previous vocation, employment, or affiliation, shall be classified as a representative of employees. *Each appointee shall have the qualifications required by law for circuit judges.* . . .
> (emphasis supplied)'

The Commissioners are now required to be full-time and to have been members of The Florida Bar for at least five years. They have research assistants and operate much like our District Courts of Appeal. Also, Judges of Industrial Claims (formerly Deputy Commissioners) have consequently been elevated in the sphere of workmen's compensation to a status somewhat akin to circuit judges. The process from the time the claim is filed through the time petition for writ of

certiorari is filed with this Court has become more judicial in nature since the 1971 reorganization. In view of these facts, particularly the fact that the Commissioners are now full-time lawyers, we feel compelled to reevaluate our prior decisions of Ball v. Mann, supra, Hardy v. City of Tarpon Springs, supra, and Brown v. Griffin, supra, respecting requirements imposed upon the Judge of Industrial Claims in making his findings of fact. Recognizing the tremendous magnitude of the caseload on Judges of Industrial Claims and in light of the new posture of the Commission, we have decided to reexamine the stringent requirements for findings of fact set forth in the above cited decisions of this Court. We now hold the Judge of Industrial Claims need make only such findings of ultimate material fact upon which he relies, as are sufficient justification to show the basis of an award or a denial of the claim."

In *Scholastic Systems, Inc. v. LeLoup*, 307 So.(2d) 166 (1975), the Supreme Court of Florida further stated:

> "We recently treated the IRC as a judicial body in our opinion at 285 So.2d 601 (Fla. 1973), adopting its Workmen's Compensation Rules of Procedure. In our opinion we delineated the review of workmen's compensation cases by the IRC as 'judicial' and expressly recognized the judicial nature of its function. The federal court system has both 'Article I courts' and 'Article III courts,' an example of the former being the tax court. A body may be a 'court' without being named within the constitutional article dealing with the judiciary (in the case of our state constitution, Art. V), so long as it fulfills the requirements making it a judicial body of review. Our task is to determine what

qualities are necessary in order for a body exercising judicial functions to meet constitutional requirements. Black's Law Dictionary, Rev. 4th Ed., informs us that such a body is: (p. 425)

> 'A tribunal officially assembled under authority of law at the appropriate time and time, for the administration of justice. In re Carter's Estate, 254 Pa. 518, 99 A.58.
>
> 'An agency of the sovereign created by it directly or indirectly under its authority, consisting of one or more officers, established and maintained for the purpose of hearing and determining issues of law and fact regarding legal rights and alleged violations thereof, and of applying the sanctions of the law, authorized to exercise its powers in due course of law at times and places previously determined by lawful authority, Isbill v. Stovall, Tex.Civ.App., 92 S.W. 2d 1067, 1070.'

and further at p. 426 as:

> '. . . having power and authority of law at the time of acting to do the particular act. Ex parte Plaistridge, 68 Okl.256, 173 P.646,647.'

The term 'judicial function' is defined by Ballentine's Law Dictionary as: (p. 685)

> 'A function exercised by the employment of judicial powers.'

And in turn, 'judicial power' is defined as: (p. 686)

> 'That part of the sovereign power which belongs to the courts or, at least, does not belong to the legislative or executive department.'

Measured by these standards, the Industrial Relations Commission easily fits within these definitions as a judicial tribunal meeting constitutional requirements."

• • •

"In addition to the statutory provisions of F.S. § 20.17(7) noted by Mr. Justice Roberts in the above quote, we would further point out that F.S. § 440.44(4) provides: 'No person shall be appointed judge of industrial claims who is not an attorney-at-law admitted to practice in this state.' and that the recently concluded session of the Legislature increased the salary of the members of the Industrial Relations Commission so that it is now equivalent to that paid to judges of the district courts of appeal, by amending F.S. § 440.441. This same act (Ch. 74-363, Senate Bill 873) also amended (F.S. § 20.17(7) to provide that each appointee to the Industrial Relations Commission 'shall have the qualifications required by law for judges of the district courts of appeal,' rather than those of circuit judges as previously required, thus further 'upgrading' the status of the IRC to the level of an appellate court.

All of the provisions make eminently clear the legislative intent to elevate the status of the IRC to that of a judicial body. That intent has been studiously carried out and its able 'judges' have been most carefully screened and chosen for the highest qualifications in this specialized field of the law. The IRC now occupies a position in the structure of our state government equivalent to the 'Article I' courts found in the federal system. The lack of the word 'court' in its title is irrelevant; the Board of Tax Appeals was no less a judicial body before its title was changed to that of

'Tax Court of the United States.' As Shakespeare said: 'What's in a name? That which we call a rose by any other name would smell as sweet.' We conclude, then, that whatever its title, the Industrial Relations Commission fulfills the requirements of a judicial body of review."

Again, in *Colvin v. State, Department of Transportation*, 311 So.(2d) 366 (1975), the Supreme Court of Florida expressed the following:

"Where the IRC[1] is placed on the level of an 'appellate court' in the review of JIC[2] actions, as it has been by our holding in *Scholastic Systems*, it follows as with DCA[3] appeals that the actions of the 'trial court' (JIC) arrive in the appellate court (IRC) with a presumption of correctness. JIC findings and awards or denial thereof can be overthrown only if not well founded under applicable legal principles, which would include a misapplication of applicable law, or upon a showing of a lack of competent evidence to support the findings or the ruling of the trial judge. IRC affirmance when there is such a lack of evidence, or reversal where the evidence is in fact sufficient, would constitute a 'departure from the essential requirements of law' which would vest jurisdiction for certiorari in the Supreme Court. It is upon the latter basis that this review has been granted.

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1 IRC is Industrial Relations Commission

2 JIC is Judge of Industrial Claims

3 DCA is District Court of Appeal

[3] The IRC, like the DCA, cannot be permitted to substitute its judgment on matters of discretion where there is sufficient proof in the record to support the trial judge's findings and rulings, even though the appellate view of the matter might have been different had the IRC been in the position of the trial judge. Applying this rule to the present case, it is apparent that IRC has fallen into that temptation which has in the past befallon appellate courts, of substituting its 'better judgment' for that of the 'errant trial judge' which is not permitted."

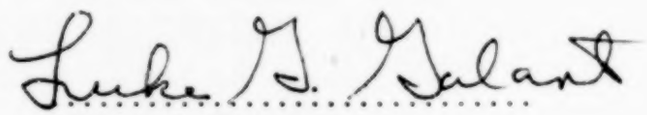
In view of the foregoing it is urged that to apply a different standard in workmen's compensation hearings from that found in civil trials is a denial of equal protection, over and above a denial of due process.

It should also be pointed out that the workmen's compensation decisions upholding a reversal because no transcript of testimony was available were rendered before the Judges of Industrial Claims and the Industrial Relations Commission were "upgraded."

CONCLUSION

Accordingly, Petitioners pray that this Honorable Court grant their Petition for Writ of Certiorari herein filed to e-view Order of the Supreme Court of the State of Florida.

Respectfully submitted,



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Attorney for Petitioners

APPENDIX

APP. "A"

SUPREME COURT OF FLORIDA
JANUARY TERM, A.D., 1976
WEDNESDAY, JANUARY 21, 1976

CASE NO. 47,486

INDUSTRIAL RELATIONS COMMISSION
UNITED STATES GYPSUM CO.,
et al.,

Petitioners,

vs.
JACKSONVILLE BUSINESS SERVICES,
et al.,

Respondents.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the Industial Relations Commission and the Cout finding no departure from the essential requirements of law, it is ordered that said petition be and the same is hereby denied. See: *Scholastic Systems, Inc., et al. vs. LeLoup, et al.*, 307 So. 2d 166 (Fla. 1974).

ADKINS, C.J.; ROBERTS, ENGLAND and SUNDBERG, JJ., concur

BOYD, J., dissents

A True Copy

TEST:

/s/ Sid J. White
Clerk Supreme Court

TC

cc: Hon. Verna Martin, Clerk

Luke G. Galant, Esq.
of DAWSON, GALANT, MADDOX, SULIK & NICHOLS
John C. Taylor, Jr., Esq.
of MATHEWS, OSBORNE, EHRLICH, McNATT, GOBELMAN & COBB
Samuel S. Jacobson, Esq.

APP. "B"

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI TO
THE INDUSTRIAL RELATIONS COMMISSION

UNITED STATES GYPSUM COMPANY,
Employer,
and
AMERICAN MOTORISTS INSURANCE COMPANY,
Carrier,

Petitioners,

-vs-

JACKSONVILLE BUSINESS SERVICES, INC.,
Employer,
LIBERTY MUTUAL INSURANCE COMPANY,
Carrier
JOHN ANDERSON,
Employee,
and
INDUSTRIAL RELATIONS COMMISSION, STATE OF FLORIDA,

Respondents.

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF FLORIDA:

Your Petitioners, United States Gypsum Company, Employer,and American Motorists Insurance Company, its Carrier, bring this their petition for a writ of certiorari against Jacksonville Business Services, Inc., Employer, Liberty Mutual Insurance Company, its Carrier, John Anderson, Employee, and Industrial Relations Commission, State of Florida, Respondents, saying:

1. This is an application for a writ of certiorari under Rules 4.1 and 4.5 c of the Florida Appellate Rules providing for certiorari to review compensation order of the Florida Industrial Relations Commission. It is anticipated the available original record of the proceeding before the Judge of Industrial Claims will be transmitted to this Honorable Court by the Clerk of the Florida Industrial Relations Commission as required by law, even though the Industrial Relations Commission apparently never saw, much less considered, the Order of the Judge of Industrial Claims which it reversed. To facilitate consideration of this petition, however, petitioners are attaching hereto copy of the Judge of Industrial Claims' Order of March 31, 1975, of his Certificate of April 28, 1975, and of the Industrial Relations Commission's Order of May 6, 1975.

2. The rendition date of the Florida Industrial Relations Commission's Order under review is May 6, 1975. The petitioners are the employer and its carrier. The respondents are respectively another employer, its carrier, the employee, and the Florida Industrial Relations Commission, all as designated under and pursuant to the Workmen's Compensation Law of the State of Florida, Chapter 440, Florida Statutes. However, the employee is not an interested party.

3. Claim was made for reimbursement and/or indemnification by Respondent Liberty Mutual Insurance Company on

November 19, 1974 as workmen's compensation carrier for Employer Jacksonville Business Services, Inc., on the grounds that they were presenting a controversy within the meaning of Section 440.42(3), Florida Statutes, and they asserted that when the Employee John Anderson was injured on July 13, 1972, he was an employee of United States Gypsum Company. Petitioners controverted. A detailed and extensive hearing was held before the Judge of Industrial Claims. Following this hearing at which five witnesses testified, the Judge of Industrial Claims entered an eleven page Order dated March 31, 1975. That Order, extensively detailing the Judge's findings of fact and conclusions of law, denied Jacksonville Business Services, Inc.'s and Liberty Mutual Insurance Company's claim.

4. In the process of preparing the record for Respondents Jacksonville Business Services, Inc. and Liberty Mutual Insurance Company's Application For Review, it was discovered that the Voicewriter used by the Judge of Industrial Claims to record the testimony at the hearing had malfunctioned and thus failed to record any testimony. On April 28, 1975, the Judge of Industrial Claims certified to the Industrial Relations Commission that this malfunction had occurred and requested an extension of time for the filing of an appeal. The Industrial Relations Commission responded by issuing an Order, *sua sponte*, dated May 6, 1975 reversing the Order dated March 31, 1975, and it remanded the cause to the Judge of Industrial Claims for rehearing. This petition is filed for the purpose of seeking a reversal of the Industrial Relations Commission's Order dated May 6, 1975.

5. The issue involved in this petition is whether the Industrial Relations Commission, sitting as an appellate body, acted with proper regard to fundamental justice, to the essential

requirements of law, and to due process, both under the Constitution of the State of Florida and the United States Constitution, when it ordered a hearing *de novo* simply because no transcript was available for appeal, even though an *eleven* page Order reciting the testimony and findings was available. Petitioners submit that all relevant precedents involving appeals to the various District Courts of Appeal indicate that the Commission erred in ordering the hearing *de novo* and furthermore, that such an Order was violative of petitioners' rights to justice and due process of law. See *Agricultural Delivery Service, Inc. vs. Travelers Insurance Co.*, 269 So.2d 429 (Fla.App. 1972); *Travelers Insurance Co. vs. Agricultural Delivery Service*, 262 So.2d 210 (Fla.App. 1972); *Smith vs. Smith*, 148 So.2d 287 (Fla.App. 1963); and *Lyden vs. DePiera*, 147 So.2d 573 (Fla.App. 1963). On the other hand two cases decided by this Court seem to be in point, *Lieber v. Morris Lieber, Inc.*, 168 So.2d 313, and *Warddell v. Tropicana Products, Inc.*, 256 So.2d 213, but they seem to be in direct conflict with the several cases decided by the various District Courts of Appeal covering court proceedings. Why should a different rule apply in Circuit Court--District Courts of Appeal situations and Judge of Industrial Claims--Industrial Relations Commission proceedings? The accepted concept is that for workmen's compensation purposes the Judge of Industrial Claims is at the level of the Circuit Judge and the Industrial Relations Commission is on a par with the District Courts of Appeal. To require a trial de novo in one and not the other is a denial of equal protection and a denial of due process under the Constitution of the State of Florida and the United States Constitution.

Until its repeal in 1971 in favor of the Florida Appellate Rules, Section 59.01 (4) of Florida Statutes read as follows:

> "Appeals, except where otherwise expressly provided by law, shall be a matter of right."

This section obviously contemplated that a transcript of testimony exist.

Rule 1.035 of Rules of Civil Procedure currently recites:

> "Proceedings shall be reported on the request of any party. He shall be responsible for payment of the reporter. The Court may order the proceedings reported. Otherwise, reporting of any proceedings shall not be required."

It is fair inference that in the several District Courts of Appeal cases cited above reported proceedings were requested, otherwise there would have been no appellate issue.

In view of the foregoing it cannot be said that Section 440.29, Florida Statutes, requiring hearings to be reported is unique and therefore the basis for special treatment.

Further, the reporting requirement is not made the burden of any of the parties but that of the Commission instead. Why should the prevailing party in effect be penalized in a situation reflected by the current case, especially when an explicit, detailed Order eleven (11) pages long exists?

6. This petition should be granted to prevent execution of an Order which constitutes a departure from the essential requirements of the law and is therefore illegal. Petitioners prepared for and litigated through a complete hearing after which they were found to be free of liability from the claim made. To rehear the claim as ordered by the Commission would be a violation of the rule of *res judicata*, a rule which is a basic foundation of due process of law. The fundamental

ideas of justice which are our heritage require that petitioners not be placed in jeopardy again by a *de novo* hearing.

WHEREFORE, petitioners urge that the Order of the Florida Industrial Relations Commission be reversed and that the Order of the Judge of Industrial Claims be reinstated.

Respectfully submitted,

DAWSON, GALANT, MADDOX, SULIK & NICHOLS, P.A.

By /s/ LUKE G. GALANT
Attorneys for Petitioners
320 East Adams Street
Jacksonville, Florida 32202

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing was mailed to John C. Taylor, Jr., Esquire, Attorney for Employer Jacksonville Business Services, Inc. and its Carrier, Liberty Mutual Insurance Company, to Samuel S. Jacobson, Esquire, Attorney for Employee, and to the Florida Industrial Relations Commission, this 4th day of June, 1975.

/s/ LUKE G. GALANT
Attorney

APP. "C"

State of Florida

INDUSTRIAL RELATIONS COMMISSION
CLAIMANT: John Anderson, Jr.

CL. NO.: 276-56-7423

D/A 7/13/72

Jacksonville Business
Services, Inc.
Liberty Mutual Insurance Co.,

Appellants

v.

U. S. Gypsum Co.
American Motorists Ins. Co.,

Appellees

Mathews, Osborne, Ehrlich, McNatt, Gobelman & Cobb, Jacksonville, for Appellants

Luke G. Galant, Jacksonville, for Appellees

ORDER

Per Curiam.

This cause comes before the Industrial Relations Commission upon Appellants' Application for Review of the Judge of Industrial Claims' Order dated March 31, 1975. The Judge of Industrial Claims has certified that, because of mechanical failure, it will be impossible to make a transcription of the evidence adduced in the hearing from which that Order arose.

Because the Order herein is unsupported by a record, the Industrial Relations Commission, *sua sponte*, reverses the Order dated March 31, 1975, and remands jurisdiction of this cause to the Judge of Industrial Claims for the purpose of conducting such further proceedings as are necessary and proper.

It is so ordered.

SEAL

INDUSTRIAL RELATIONS COMMISSION

LEONARD A. CARSON, Chairman

ELMER O. FRIDAY, JR., Commissioner

LEANDER J. SHAW, JR., Commissioner

This is to certify that on this May 6, 1975, the above Order was filed in the office of the Industrial Relations Commission at Tallahassee and a copy sent by certified mail to each interested party at his last known address.

INDUSTRIAL RELATIONS COMMISSION

BY /s/ N. V. MARCHANT
Deputy Clerk

cc: Thomas J. Carroll,
Judge of Industrial Claims

APP. "D"

STATE OF FLORIDA, DEPARTMENT OF COMMERCE

Division of Labor and Employment Opportunities
Bureau of Workmen's Compensation

CLAIM NO: 276-56-7423 July 13, 1972

EMPLOYEE: JOHN ANDERSON, JR.
3150 Gladys Street
Jacksonville, Florida 32209
Represented by:
SAMUEL S. JACOBSON, ESQUIRE
Southeast First Bank Bldg.
Jacksonville, Florida 32202

CLAIMANT: (1) LIBERTY MUTUAL INSURANCE
3986 Boulevard Center Drive
Jacksonville, Florida 32207
Represented by:
(1) JOHN C. TAYLOR, JR., ESQUIRE
1500 American Heritage Bldg.
Jacksonville, Florida 32202

EMPLOYER: (1) JAX BUSINESS SERVICES, INC.
12 North Liberty Street
Jacksonville, Florida 32202

ALLEGED
EMPLOYER: (2) UNITED STATES GYPSUM CO.
6825 Evergreen Avenue
Jacksonville, Florida 32202

CARRIER: (2) AMERICAN MOTORISTS INSURANCE COMPANY
4040 Woodcock Drive
Jacksonville, Florida 32207
Represented by:
(2) LUKE G. GALANT, ESQUIRE
320 E. Adams Street
Jacksonville, Florida 32202

COMPENSATION ORDER

JUDGE OF INDUSTRIAL CLAIMS
THOMAS J. CARROLL

THIS CAUSE came on to be heard before me, the undersigned Judge of Industrial Claims, on January 13, 1975, and on memos filed January 20 and 23, 1975, and based on the evidence and testimony presented as well as the stipulations between the parties, I hereby make the following findings of fact:

1. That the Judge of Industrial Claims has jurisdiction of the parties and the subject matter hereto.

2. Claim was made for reimbursement and/or indemnification by Liberty Mutual Insurance Company, as Workmen's Compensation carrier for the employer, Jax Business Service, Inc., on the grounds that they were presenting a controversy within the meaning of Section 440.42(3), Florida Statutes, and they asserted that when the claimant, John Anderson, Jr., was injured, he was, in fact, and in law, an employee of U. S. Gypsum Company, and if a determination is made that U. S. Gypsum Company was Anderson's employer at the time of his accident, then Liberty Mutual Insurance Company should be reimbursed, in full, for medical and compensation

benefits they previously paid to the claimant, John Anderson, Jr., and to the treating hospital and doctors.

3. The claim was defended on multiple grounds as follows:

a. That the Judge of Industrial Claims has no jurisdiction in that Section 440.42(3), Florida Statutes, does not comprehend such a situation as this, but rather a situation where the question was which carrier covered a particular employer, and there is no such question in this situation in that it was admitted by all involved that Liberty Mutual had the coverage for Jax Business Service, Inc. and American Motorists had the coverage for U. S. Gypsum Company.

b. If Section 440.42(3), Florida Statutes were in fact applicable the proviso clause in these concerning "after it had knowledge" of potential liability must be considered and here no Workmen's Compensation claim was ever filed against U. S. Gypsum or American Motorists; and Liberty Mutual treated U. S. Gypsum as a third party tort feasor and filed a lien against U. S. Gypsum, and never asserted, previously, any responsibility of U. S. Gypsum or its carrier in connection with the Workmen's Compensation claim.

c. American Motorists and U. S. Gypsum did not defend the Workmen's Compensation claim or participate in the washout settlement and were prejudiced by unilateral actions taken by Liberty Mutual in this regard without consulting with American Motorists or U. S. Gypsum.

d. That the claimant was not an employee of U. S .Gypsum; that there was no contract of hire between U. S. Gypsum and the injured claimant, John Anderson; that he was never paid any salary by U. S. Gypsum; and that he was never hired by U. S. Gypsum.

e. That he was on U. S. Gypsum premises pursuant to a contractural arrangement with Jax Business Service, Inc., who paid the claimant's salary, Workmen's Compensation premium, Social Security contributions, etc., and if claimant could be considered an employee of U. S. Gypsum he was their employee secondarily and was primarily the employee of Jax Business Services, Inc. and the contract between U. S. Gypsum and Jax Business Service, Inc. obligated Jax Business Service to provide Workmen's Compensation coverage, thus relieving U. S. Gypsum of any responsibility; that the arrangement was analogous to a general and sub relationship under Section 440.10, Florida Statutes; and that if Jax Business Services, Inc. was considered a sub providing a service for U. S. Gypsum, then it was a covered sub with coverage with Liberty Mutual.

4. In connection with the various objections made, I find I cannot accept the position of counsel for Liberty Mutual that the only relevant evidential matters concerned the question of which party Anderson was employed by at the time of his accident. I find that the evidence at the hearing must be enlarged sufficiently to include other relevant testimony offered by counsel for U. S. Gypsum and its carrier, American Motorists Insurance Company.

5. I find that Harry J. Smith is a Claims Supervisor with Liberty Mutual Insurance Company and supervised Anderson's accident claim. A breakdown of the various benefits paid by this carrier was admitted in evidence as Liberty Mutual Insurance Company's Exhibit No. 1. I find the total compensation and medical amounted to $27,818.20. I find that the claimant was taken from the premises of U. S. Gypsum as an emergency case on the very day of the injury, and was taken directly to University Hospital where he was

hospitalized from July 13, 1972, through September 30, 1972. I find that he came under the care of Dr. Ira Dushoff, a plastic surgeon, because of extensive burn injuries to the claimant's hands and other portions of his body. I find Liberty Mutual paid temporary total through August 2, 1973, and worked out a Joint Petition settlement of the claim in which the claimant was awarded permanent partial benefits based on a 61% rating of the right hand and a 33% rating of the left hand, for a total settlement of $10,000.00 in compensation benefits and $2,550.00 in future medical allowance, which settlement was in addition to previous temporary total benefits paid and previous advances of permanent partial benefits.

6. I find Frederick Gerald Hall is a mill superintendent with U. S. Gypsum Company and was acting in that capacity on July 13, 1972. I find that Handi-Man, also known as Jax Business Services, Inc., supplied labor to U. S. Gypsum on an "as needed" basis under a contract agreement for non-routine work. I find that when an occasion arose for need of such labor this witness would arrange for notifying Jax Business Services, Inc. of the work to be done and the number of people needed and in this manner Anderson reported to their premises for his work assignment. I find that he was assigned the task of cleaning out a fire box which became clogged as a result of a mechanical malfunction, and this was non-routine work. I find a purchase order then in effect which was purported to be the same in its terms as one in effect at the time of the accident was proferred in evidence, but was not admitted in evidence. I find that the superintendent testified concerning U. S. Gypsum's arrangement with Jax Business Services, Inc. and I have relied on the testimony and not the exhibits in the pertinent findings. I find that an individual reporting to U. S. Gypsum in this

manner would have a form from Jax Business Services, Inc. which someone in authority at U. S. Gypsum would fill in, indicating the number of hours worked. I find that there was a minimum of four hours guaranteed. I find that any payment from U. S. Gypsum went directly to Jax Business Services, Inc. and that the individuals reporting to work in this manner were, in turn, paid by Jax Business Services, Inc. and were not reflected on U. S. Gypsum's payroll for Workmen's Compensation premium purposes. I find that in addition to the contract Jax furnished U. S. Gypsum a certificate of insurance, a copy of which was admitted in evidence, and U. S. Gypsum would not enter into this type of arrangement with anyone, who furnished labor, without proof of such coverage being furnished.

7. I find the procedure followed after the order was phoned in to Jax and the work was explained to them, would be for Jax to select individuals whom they transported to the U. S. Gypsum plant in their own vehicle leaving them out there without any Jax supervisor and they, in turn, would report to a U. S. Gypsum supervisor, who would show them what they were to do and would answer any questions they may have. I find that the nature of the work was passed on to Jax via phone and the individuals reporting usually knew, before they left Jax, what work they were to perform, and after arriving there, Anderson had the option to leave and U. S. Gypsum, if they wished, could tell him to leave, but they were obligated to provide four hours work and pay four hours even if he was used for a lesser period of time. I find U. S. Gypsum paid Jax monthly, under the contract and Jax paid the individual workers daily.

8. I find that John Provost is an insurance adjuster with Gateway Claims Service and he investigated this accident at

the request of American Motorists and during the course of his investigation was contacted by a representative of Liberty Mutual and subsequent correspondence with Liberty Mutual was admitted in evidence. I find that this contact with Liberty Mutual regarded a subrogation claim on the grounds that U. S. Gypsum was negligent and Liberty Mutual wanted to make a recovery of part of the Workmen's Compensation benefits they paid. I find that there was no contention then that Anderson was an employee of U. S. Gypsum and Liberty Mutual was apparently considering U. S. Gypsum a third party tort feasor. I find that this approach to the legal status of the various parties at that time would not be binding or prevent a later change of position by Liberty Mutual, and has no real value in determining the merits of the present claim as presented by Liberty Mutual under the Workmen's Compensation law, except to the extent it establishes that Liberty Mutual failed to put American Motorists on notice of any potential liability under the Florida Workmen's Compensation Law. I find that Provost's investigation, at American Motorists request, was to look into possible liability exposure rather than Workmen's Compensation exposure.

9. I find that Steve Robinson is currently manager of American Motorists' office in Jacksonville, and has been here since March, 1974. I find he had no personal knowledge of the earlier dealings and could only refer to the carrier's file, and he testified that there was nothing in the file that established any Workmen's Compensation claim had ever been made against American Motorists until they were notified, on November 25, 1974, of this present hearing.

10. I find that John Anderson, Jr., is thirty-five (35) years of age, and completed the fifth grade of school. I find that prior to July, 1972, his work was primarily warehouse work,

performing day's work through Jax, and that he had been doing this for some three years with Jax, prior to his accident of July 13, 1972. I find he was in the habit of going daily to Jax, at 8:00 A.M., to catch jobs, and that Jax would transport the workers to the work site. I find he accompanied six or seven workers, such as himself, to U. S. Gypsum on the day of his accident and they reported to the superintendent at U. S. Gypsum and the Jax truck driver drove off, returning to Jax. I find that when Anderson reported, the superintendent told him what to do and took the claimant to Tank No. 1 and gave him a shovel and asked him to do a particular job. I find that this required the claimant to enter the tank, and clean out loose material in the tank and he was instructed not to remain in the tank more than fifteen (15) minutes at a time. I find he asked another Jax worker who was to work along with him if he should go in first, and it was agreed that Anderson would go in first and the other worker gave Anderson his safety shoes. I find that the claimant entered the tank and after two or three minutes, the heat on the floor became so intense it was burning his feet and in the process of getting out of the tank, he sustained burns to both hands, his legs, stomach and other portions of his body. I find he was taken from the U. S. Gypsum plant to the hospital where he was hospitalized for approximately three and one-half (3½) months. I find he had prior minor injuries while working in this manner, but never serious enough to file a Workmen's Compensation claim against Jax. I find he usually worked two or three days per week, and was paid $1.60 per hour, and he kept a record of his hours worked when sent out to the various work sites, and the supervising individuals there would sign for the number of hours, and he would then take the record to Jax, and, in turn, would be paid by Jax. I find he was aware that Jax was paid more by the particular organization

he performed labor for than he was paid in turn by Jax and he was aware that Jax withheld tax and Social Security amounts from its payment to him. I find he had heard talk about Jax being the one having his Workmen's Compensation coverage and he considered himself an employee of Jax. I find that on one occasion, while at the U. S. Gypsum plant, some of the regular workers there told him that if he wanted a regular job there he could apply. I find he indicated that he would rather follow his usual mode of work, working through Jax.

11. I find Liberty Mutual was aware of the type business conducted by Jax Business Services, Inc., and provided Workmen's Compensation coverage with this knowledge. It may be repugnant to approve a labor arrangement where an organization may exact a profit by furnishing individuals to other employers to perform distasteful tasks an employer does not wish to assign his regular employees, but all the parties involved here were acting with full knowledge of the factual situation.

12. On the jurisdictional question, I find Liberty Mutual has presented sufficient facts in its claim to support its position that there was an actual controversy involved here as to which of two carriers is liable for the discharge of the obligations and duties of one or more employers with respect to a claim for compensation; remedial treatment or other benefits under the Florida Workmen's Compensation Law. I find this gives the Judge of Industrial Claims jurisdiction to adjudicate the controversy. I find that the facts as presented at the hearing established a clear case where the injured person is the employee of Jax Business Services, Inc. and that Liberty Mutual is the carrier for Jax Business, Inc. I find this resolves the controversy and that the payments

have already been made by the correct carrier. I also find that if it was determined that American Motorists was the responsible carrier that Liberty Mutual would not be entitled to any reimbursement because I find all of the payments to the claimant were made before Liberty Mutual put American Motorists on notice of its potential liability and I find American Motorists has been prejudiced by such lack of the knowledge in that it had no opportunity to enter into the administration or settlement of the workmen's compensation claim.

ACCORDINGLY, it is ORDERED that the claim made herein, by Liberty Mutual Insurance Company, should be and the same is hereby denied.

DONE AND ORDERED at Jacksonville, Duval County, Florida, this 31st day of March, 1975.

S E A L

/s/ Thomas J. Carroll
Judge of Industrial Claims

cc: Parties

THIS IS TO CERTIFY that the foregoing order was entered on the 31st day of March, 1975, and that a copy thereof was sent on said date by certified mail to the claimant and the employer and by regular mail to all other interested parties, at the last known address of each.

/s/ Frances S. Garner
Secretary to Judge of
Industrial Claims

APP. E

AMENDMENT V

"No person shall be *** deprived of life, liberty, or property, without due process of law ***"

APP. F

AMENDMENT XIV

"*** nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In The Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1467

UNITED STATES GYPSUM COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY,
Petitioners,

-vs-

JACKSONVILLE BUSINESS SERVICES, INC., LIBERTY MUTUAL INSURANCE COMPANY, JOHN ANDERSON, and INDUSTRIAL RELATIONS COMMISSION, STATE OF FLORIDA,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorney for Respondents

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JURISDICTION

Issuance of a writ of certiorari is, of course, a discretionary matter, and the writ will not be issued where the cause does not present questions of sufficient gravity. *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953). The mere presence of jurisdiction upon a petition for such writ

does not determine the exercise of that jurisdiction. *Hammerstein v. Superior Court of California,* 341 U.S. 491, 71 S.Ct. 820, 95 L.Ed. 1135 (1951). Rather, a writ of certiorari is granted or denied in the exercise of a sound discretion. *Philadelphia & Reading Coal and Iron Co. v. Gilbert,* 245 U.S. 162, 38 S.Ct. 58, 62 L.Ed. 22 (1917). Respondent respectfully submits that the instant cause is among those as to which that discretion should be exercised by denying the petition.

ARGUMENT

1. WHETHER A STATE APPELLATE TRIBUNAL, *SUA SPONTE,* MAY WITHOUT VIOLATING DUE PROCESS, REVERSE THE COMPREHENSIVE DECISION OF A TRIAL JUDGE SOLELY BECAUSE MECHANICAL FAILURE OF A RECORDING MACHINE PREVENTED TRANSCRIPTION OF THE EVIDENCE ADDUCED AT TRIAL?

Petitioner initially contends that it is a violation of the Due Process Clause of the Fourteenth Amendment for a State to provide the procedural remedy of remanding a cause for a *de novo* trial when, through no fault of any party to the cause, it is impossible to present to the appellate tribunal a record of the proceedings below. Petitioner contends that where the original tribunal has rendered a decision, and it becomes impossible -- without fault on the part of anyone -- to present a record of the initial proceedings to an appellate tribunal, then the appellant must suffer the consequences.

The basic weakness of this suggestion can be readily seen

from the following hypothetical. Assume that the Judge of Industrial Claims in the instant cause did in fact commit reversible error, and the record would clearly reveal that fact. Is the appellant to be deprived of the benefit of an error-free adjudication (or of the right to appeal where error exists) simply because a tape recorder malfunctions -- especially where the relevant statutory provisions place the burden of preparing the record on the adjudicatory body, rather than on the appellant -- in order to assure due process? Clearly, such a holding would itself be a denial of due process of law, since it would deprive the appellant of his rights due to a matter beyond his control and as to which the statutory burden is on another. Nor, in all candor, would it comport with due process to reverse the lower tribunal and direct it to enter a judgment contrary to the one it originally had entered. Rather, it is submitted, the course of essential justice is that chosen by the appellate tribunals in the instant cause -- to remand the action for *de novo* treatment. In this manner, neither side bears the ultimate penalty of losing its suit because of a mere mechanical malfunction for which neither bears the brunt of responsibility.

Although this particular type of situation appears to be relatively rare, it is not totally without precedent. Courts in other states have also adopted the solution of a remand for *de novo* treatment where, for some reason, a record of the proceedings in the lower tribunal is unavailable on appeal. See, for instance; *Scharff v. Holschbach,* 220 Mo. App. 1139, 296 S.W. 469; *Woods v. Bottmos,* 206 S.W. 410; *Todd v. Security Ins. Co.,* 206 S.W. 412; *Reynolds v. Romano,* 96 Vt. 222, 118 A 810; *Coan v. Plaza Equity Elevator Co.,* 60 N.D. 51, 232 N.W. 298; *Fire Ass'n. of Philadelphia v. McNerney,* 54 S.W. 1053; *Shafer v. King,* 82 Colo. 258, 259 P. 1042;

Harris v. First Nat. Bank of Pryor Creek, 140 Okla. 269, 282 P. 1097; *Gibson v. City of Chickasha*, 171 Okla. 284, 43 P. 2d 95.

The Constitution fixes limits on the administrative process by prohibiting, without due process of law, the deprivation of property from any individual. When the Legislature acts directly, it is subject to judicial scrutiny. When the Legislature acts indirectly by working through quasi-judicial bodies, this scrutiny cannot be evaded by preventing review by the Industrial Relations Commission or by the courts simply because, through no fault of the parties, no record was available and by praying instead that findings of fact unsupported by any record evidence be accepted in lieu of a transcript:

> "Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction . . ."

St. Joseph Stockyards Co. v. United States, 298 U.S. 38, 56 S.Ct. 720, 89 L.Ed. 1033, 1041 (1935).

To say that the complete absence of a record does not require a hearing *de novo* is to say in effect that the Judge of Industrial Claim's findings are conclusive and that a blameless Appellant is to suffer the consequences regardless of where true justice might lie.

In addition to the cases in civil actions from other jurisdictions noted above, both this Court and the Supreme Court of Florida have held squarely that the absence of a record of proceedings in an administrative body, or material parts thereof, requires a hearing *de novo*. In *Kwock Jan Fat v.*

Edward White, 253 U.S. 454, 40 S.Ct. 566, 64 L.Ed. 1010, 1014 (1919), petitioner, a person of Chinese descent, sought re-admission to the United States from China, claiming American citizenship by birth. After a hearing, a final decision by the examining inspector adverse to petitioner was affirmed by the Commissioner of Immigration and the Secretary of Labor. Petitioner filed a petition for writ of habeas corpus contending, *inter alia*, that the examining inspector did not record an important part of the testimony of three witnesses called by petitioner, with the result that that testimony was not before the Commissioner of Immigration or the Secretary of Labor when they reviewed the case. After deciding that the missing portions of the record were material and relevant, this Court went on to say:

> "The acts of Congress give great power to the Secretary of Labor over . . . persons of Chinese descent. . . . It is the province of the courts, in proceedings for review, . . . to prevent abuse of this extraordinary power, *and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment.* For failure to preserve such a record for the information, not less of the commissioner of immigration and of the Secretary of Labor than for the courts, the judgment in this case must be reversed. 253 U.S. at 464 (Emphasis supplied.)

In *Lieber v. Morris Lieber, Inc.*, 168 So. 2d 313 (Fla. 1964), the employer and carrier, in a compensation matter, asked the Industrial Relations Commission for a *de novo* hearing because no record of proceedings below was available. The Industrial Relations Commission granted the new

hearing and the claimant filed a Petition for Writ of Certiorari. The Supreme Court of Florida cited F.S. § 440.29(2) in support of its affirmance of the granting of the *de novo* hearing, and went on to say:

> "We believe, however, that a de novo hearing upon the claim necessarily encompasses a quashal of the award previously made and the entry of an order anew by the deputy based solely upon such evidence as may now be proffered." (168 So. 2d at 313)

Thus the fact that a Record cannot be prepared is grounds for the quashal of the Order below and the holding of a new hearing, with the subsequent Order to be based solely upon the new evidence.

The Supreme Court of Florida dealt with a similar situation in *Warddell v. Tropicana Products, Inc.*, 256 So. 2d 212 (Fla. 1971). In that case, portions of the record could be prepared, but the record as a whole was so poor as not to be a sufficient basis for consideration by an appellate authority. The Court quoted with approval the *Lieber* decision, *supra*, and went on to say:

> "We can only conclude that the affirmative requirement of the compensation law that testimony shall be reported and orders reviewed upon a transcript is not met by this record. We do not think that *Lieber* can be distinguished on the theory that there the transcript was unobtainable, whereas in the instant case a partial transcript was submitted. A partial transcript as incomplete as that submitted here is of no more value than would be an absent transcript." (256 So. 2d at 214)

It is submitted that where the burden of preparing a record for the appellate tribunal is expressly placed on one other than the appellant, and that burden is not met, there is no denial of due process in the appellate tribunal remanding the cause for *de novo* treatment, so long as the failure to prepare the record is not due to the acts or omissions of the appellant.

2. WHETHER THE APPELLATE TRIBUNALS OF FLORIDA MAY WITHOUT VIOLATING THE RIGHT TO EQUAL PROTECTION OF PARTIES TO WORKMEN'S COMPENSATION ACTIONS, SET ASIDE TRIAL JUDGES' DECISIONS IN WORKMEN'S COMPENSATION CASES SOLELY BECAUSE NO RECORD OF SUCH HEARINGS IS AVAILABLE FOR APPEAL, WHILE REFUSING TO SET ASIDE DECISIONS IN COMMON LAW ACTIONS DESPITE THE SAME UNAVAILABILITY OF TRANSCRIPT?

The question presented by the Petitioner under this heading is whether the Equal Protection Clause of the Fourteenth Amendment is contravened where, due to the fact that no record of the proceedings in the administrative hearing can be prepared due to a mechanical malfunction in the recording device, the appellate tribunal quashes the Order below and remands the cause for *de novo* treatment, where such course would not be followed if the appeal were one in a common-law civil action. Respondent submits that there is no denial of equal protection under these circumstances.

In order to comply with the requirements of the Equal Protection Clause, classifications must be reasonable and non-arbitrary, and all persons in the same class must be treated alike. *Silver Blue Lake Apartments v. Silver Blue Lake Home Owners Assoc.*, 225 So. 2d 557 (Fla. App. 3d 1969). When the difference between those included in a class and those excluded from it bears a substantial relationship to the public purpose, the classification does not deny equal protection of the laws. *Daniels v. O'Connor*, 243 So. 2d 144 (Fla. 1971).

It is clear that the procedure here involved does not discriminate among persons involved in the workmen's compensation system by favoring either employers or employees. It is neutral, both facially and as applied. Petitioner does not even contend otherwise; rather, Petitioner's contention is that it is a denial of the equal protection of the laws to apply a different procedure in appeals from initial adjudications in workmen's compensation matters than the procedures applied in civil actions in the court system. Such contention is completely without merit.

Initially, it may be noted that the entire workmen's compensation system follows a different set of procedural guidelines than that applicable to civil actions in general; yet this has been held not to constitute a denial of equal protection of the laws. *Carter v. Sims Crane Service, Inc.*, 198 So. 2d 25 (Fla. 1967); *Carroll v. Zurich*, 286 So. 2d 21 (Fla. App. 1st 1973); *Gross v. Rudy's Stone Co.*, 179 So. 2d 603 (Fla. App. 2d 1965). Procedures in workmen's compensation matters differ in many ways from those applied in civil actions.

By way of illustration, the Supreme Court of Florida has held that a Judge of Industrial Claims is to be accorded "broad discretion" in considering evidence, *Tolvanen v. Eastern Air Lines*, 287 So. 2d 299 (Fla. 1973). By statute the Judge of Industrial Claims has the right to receive evidence of transactions with a decedent which are inadmissible at common law and under Florida statutory law. Compare F.S. & 440.29 and *Heath v. Thomas Lumber Co.*, 140 So. 2d 865 (Fla. 1962) with F.S. § 90.05. Further, the Judge of Industrial Claims is not bound by "technical or formal rules of procedure." F.S. § 440.29.

Because the intent of the workmen's compensation statute is to procure for the workman the most expeditious resolution of his claim and consequent prompt payment of benefits, hearings before the Judge of Industrial Claims are properly subject to different rules of evidence and procedure than suits at common law.

These differences between workmen's compensation hearings and actions at common law provide a rational basis for requiring the Judge at a compensation hearing to prepare a record and for remanding a cause for a *de novo* hearing if no record is transmitted to the Industrial Relations Commission or to a reviewing court. The function of the reviewing court is, *inter alia*, to determine if the findings which the Judge has made are supported by the evidence. *Hardy v. City of Tarpon Springs*, 81 So. 2d 503 (Fla. 1955). Because there is no record in this case, neither the Industrial Relations Commission nor the reviewing court can perform their function, and, absent remand for *de novo* treatment, the rights of the parties would be conclusively, and without hope of recourse,

determined by the Judge of Industrial Claims.

The basis for the particular distinction here involved may be found in the differences in procedure between workmen's compensation matters and general civil actions as to the responsibility for preparing and presenting a record of the proceedings in the initial tribunal. In the case of civil actions generally, it is the duty of the appellant to ensure that a transcript of the proceedings is prepared and timely filed. Rule 3.6d(2), Florida Appellate Rules. In workmen's compensation proceedings, on the other hand, that duty is expressly placed on the administrative body by F.S. § 440.29(2), which states in pertinent part:

> "Hearings before the judge of industrial claims shall be open to the public and shall be reported, and the division is authorized to contract for the reporting of such hearings. The division shall by regulation provide for the preparation of a record of the hearings and other proceedings before judges of industrial claims . . . ."

Unlike appeals from the Circuit Court, where the burden to provide a record is on the party urging error, the onus of making a ecord available for appellate review in workmen's compensation cases is on the Judge of Industrial Claims. There is a rational basis for this distinction.

And if the burden of providing a record is on one other than the appellant, it logically follows that the consequences of failing to meet that burden should not fall on the appellant, just as it is logically consistent in civil actions to penalize the appellant for failing to meet his burden.

Petitioner makes much of those Florida decisions holding that the Industrial Relations Commission is similar in many regards to the intermediate appellate courts of our state, the District Courts of Appeal. Petitioner's apparent purpose is to equate them, and thus to demonstrate an inequality. What Petitioner fails to point out, however, is that the decisions cited deal with the question of the scope of appellate review (and the proper court to perform such review, the Supreme Court of Florida being a court of limited jurisdiction) of decisions of the Industrial Relations Commission.

The hearing of workmen's compensation cases has consistently been held by Florida Courts to be administrative or quasi-judicial in nature. *Delaware v. Tutson*, 139 Fla. 405, 190 So. 675 (1939); *Scholastic Systems v. LeLoup*, 307 So. 2d 166 (Fla. 1974). In the latter case, the Supreme Court of Florida expressly held the Industrial Relations Commission to be a *quasi-judicial* body equivalent, for certain limited purposes, to a court, and analogized it to the "Article I" courts of the federal system. It may be noted in passing that such courts often have their own procedural rules not applicable in actions brought in a United States District Court; under Petitioner's argument, such rules would be unconstitutional. Clearly they are not, and equally clearly, the procedures here in question do not deprive Petitioner of the equal protection of the laws.

CONCLUSION

The Order of the Industrial Relations Commission, *sua sponte*, reversing the Order of the Judge of Industrial Claims, and requiring a *de novo* hearing, was a proper application of the law. Without the benefit of a transcript of the proceedings, appropriate appellate review cannot take place; the responsibility of preparing a record, resting with the Judge of Industrial Claims, has not been met, but neither due process nor equal protection of the laws requires that Respondent be penalized for that situation.

Respectfully submitted,

Jack W. Shaw, Jr.

JACK W. SHAW, JR.

MATHEWS, OSBORNE, EHRLICH,
McNATT, GOBELMAN & COBB
1500 American Heritage Life Building
Jacksonville, Florida 32202

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been delivered to Luke G. Galant, Attorney for Petitioners, 320 E. Adams Street, Jacksonville, Florida 32202, by first class mail, postage pre-paid, this 5th day of May, 1976.

MATHEWS, OSBORNE, EHRLICH,
McNATT, GOBELMAN & COBB

Jack W. Shaw, Jr.

JACK W. SHAW, JR.
Attorney for Respondents

APPENDIX

App. "A"

F.S. § 440.29

440.29 Procedure before the commission or judges of industrial claims.—

(1) In making an investigation or inquiry or conducting a hearing the judge of industrial claims shall not be bound by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry, or conduct such hearing in such manner as to best ascertain the rights of the parties. Declaration of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury.

(2) Hearings before the judge of industrial claims shall be open to the public and shall be reported, and the division is authorized to contract for the reporting of such hearings. The division shall by regulation provide for the preparation of a record of the hearings and other proceedings before judges of industrial claims and shall be permitted to charge for transcripts of testimony and copies of any instrument the same fees as are allowed by law to reporters and clerks of courts of this state for like services.

(3) The practice and procedure before the commission and the judges of industrial claims shall be governed by rules adopted by the Supreme Court.

App. "B"

F.S. § 90.05

90.05 Witnesses: as affected by interest.—No person, in any court, or before any officer acting judicially, shall be excluded from testifying as a witness by reason of his interest in the event of the action or proceeding, or because he is a party thereto; provided, however, that no party to such action or proceeding, nor any person interested in the event thereof, nor any person from, through or under whom any such party, or interested person, derives any interest or title, by assignment or otherwise, shall be examined as a witness in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic, against the executor, or administrator, heir at law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or the assignee or committee of such insane person or lunatic; but this prohibition shall not extend to any transaction or communication as to which any such executor, administrator, heir at law, next of kin, assignee, legatee, devisee, survivor, or committeeman shall be examined on his own behalf, or as to which the testimony of such deceased person or lunatic shall be given in evidence.

App. "C"

Florida Appellate Rule 3.6 d (2)

(2) *Designation to Reporter.* When any proceedings in the lower court have been stenographically reported, and have not been transcribed, the appellant, within the time for filing and serving assignments of error, shall file, and serve upon the appellee, a designation of such parts of said proceedings as he shall deem necessary for the appeal or an affirmative statement that he does not deem any part of such proceedings necessary. Within 10 days thereafter, the appellee shall file and serve upon the appellant a designation of such additional parts of said proceedings as he shall deem necessary for the appeal or an affirmative statement that he does not deem any part of such proceedings necessary. If appellant is served with cross assignments of error he shall have 10 days thereafter to file additional designations to the reporter. The original of such designations shall be filed with the clerk of the lower court and copies served on the reporter and the adverse party or his attorney.